IN THE

Supreme Court of the United States

October Term, 1963

No. 1053

SELDEN C. HIGGINS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Claims.

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SELDEN G. HOOPER,

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vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Claims.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Claims entered in the above-entitled case on January 24, 1964.

Opinions Below.

The opinion of the Court of Claims entered on January 24, 1964, is printed in Appendix A, *infra*, p. 1 *et seq.* and is reported in *326 F. 2d 982* (1964).

Jurisdiction.

The final judgment of the Court of Claims was entered on January 24, 1964, when it rendered its opinion denying petitioner's motion for summary judgment, dismissing petitioner's petition and granting respondent's cross-motion for summary judgment.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1255(1) (1958) providing for review of

cases in the Court of Claims by writ of certiorari granted on petition of claimant against the United States.

Question Presented.

Petitioner was a retired officer of the United States Navy, not on active duty, who was subjected to trial by naval court martial, over his objection, and sentenced to dismissal and to forfeiture of all pay and allowances in 1957. After exhaustion of all review procedures provided for by the Uniform Code of Military Justice, petitioner's conviction and sentence by the court martial were approved and ordered executed by the President on January 7, 1961, and payment of petitioner's retirement pay was discontinued as of such date.

After discontinuance of his retirement pay, petitioner brought suit for retirement pay accruing after January 7, 1961, in the Court of Claims on the ground that the court martial by which he was convicted and sentenced lacked jurisdiction.

The question presented is as follows:

Whether a retired officer of the United States Navy, drawing retirement pay, who is not on active duty, is subject to court martial in the continental limits of the United States for alleged crimes committed on private property when the civil courts are open and functioning.

Constitutional Provisions and Statutes Involved.

The constitutional provision involved is Article I, Section 8, Clause 14, granting to Congress the power to provide for government of the military forces which reads so far as pertinent here:

> "Section 8. The Congress shall have power * * *
>
> To make Rules for the government and Regulation of the land and naval forces."

The statutory provision involved is the purported exercise of this constitutional grant of power by Congress in enacting what is known as the Uniform Code of Military Justice, 64 Stat. 107, 109, 10 U. S. C. Sec. 802 (1958).

The pertinent provision of that Code involved here Article 2(4) which provides in part:

"The following persons are subject to this Chapter:

* * * * *

(4) Retired members of a regular component of the Armed Forces who are entitled to pay."

Statement.

The statement of facts in the opinion of the Court of Claims, Appendix A, *infra*, page 1 *et seq.* is not contested by petitioner.

In 1957, petitioner was a retired Rear Admiral of the United States Navy, not on active duty, drawing retirement pay. He was living in Coronado, California, and entitled to retirement pay in the amount of $433.83 per month.

Petitioner was charged with homosexual misconduct occurring after his retirement on private property in Coronado, which was not a part of any military or naval reservation. Over petitioner's objection, and without being recalled to active duty, he was subjected to a naval court martial which imposed a sentence of dismissal and forfeiture of all retirement pay and allowances.

During the pendency of the court martial, petitioner filed suit against the Commandant of the naval district in which the court martial was being held. This suit

was filed in the United States District Court for the Southern District of California, Southern Division, for injunctive and declaratory relief. The federal court denied petitioner any relief and entered findings of fact, conclusions of law and judgment in accordance therewith which is reported in *Hooper v. Hartman*, 163 F. Supp. 437 (1958 S.D. Calif.).

Petitioner appealed from the decision of the District Court to the United States Court of Appeals for the Ninth Circuit. The decision of the District Court was affirmed *per curiam* on the sole ground that petitioner had not exhausted the remedies of review of his conviction afforded by the Uniform Code of Military Justice. *Hooper v. Hartman*, 274 F. 2d 429 (9th Cir. 1959).

Petitioner was a retired Rear Admiral and it was therefore mandatory under the Uniform Code of Military Justice that his court martial conviction be reviewed by a Board of Review and the United States Court of Military Appeals because of his flag rank.

Subsequent to the decision of the United States Court of Appeals in *Hooper v. Hartman, supra*, petitioner's conviction and sentence were affirmed by military Boards of Review and the United States Court of Military Appeals which held that the court martial had jurisdiction over petitioner and that Article 2(4) of the Uniform Code was constitutional. *United States v. Hooper*, 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958); and 11 U.S.C.M.A. 128, 28 C.M.R. 352 (1960).

On January 7, 1961, the President of the United States approved the conviction and sentence of petitioner and the Government stopped paying retirement compensation to petitioner.

Upon cessation of his retirement pay, petitioner sued in the Court of Claims for accrued retirement pay on the ground that the court martial convicting and sentencing petitioner was without jurisdiction because Article 2(4) of the Uniform Code of Military Justice was unconstitutional.

Petitioner's claim was founded upon 61 Stat. 881, 10 U. S. C. Sec. 6149 (1956) and 60 Stat. 27, 10 U. S. C. Sec. 0823 (1956) and the jurisdiction of the Court of Claims invoked under 28 U. S. C. 1491 (1948) upon the basis that his conviction and sentence contravened provisions of the United States Constitution as set forth in Article I, Section 8, Clauses 13 and 14 and Amendments V and VI thereof, which it was claimed made Article 2(4) of the Uniform Code of Military Justice, 10 U. S. C. Sec. 802(4) (1958) unconstitutional.

The Court of Claims rejected the claim of the government that petitioner's suit was barred by the doctrines of *res judicata* and collateral estoppel because of the decisions of the Court of Military Appeals and the United States District Court and the affirmance of its decision by the United States Court of Appeals, *United States v. Hooper*, *supra*, and *Hooper v. Hartman*, *supra*.

The Court of Claims upheld the constitutionality of petitioner's sentence and conviction, although expressing doubt on the matter. Appendix A *infra*, page 1 *et seq*

Reasons for Allowance of the Writ.

1. A great many persons are affected by the issues decided in the Court of Claims which have not been but should be settled by this Court.

The subjection of retired members of a regular component of the Armed Forces drawing retirement pay to trial by court martial is of great public importance. There are over 188,000 retired members of a regular component of the Armed Forces who were drawing pay in 1957 and presumably subject to court martial. Clerk's Transcript, Exhibits B and C, to affidavit of Oscar E. Irwin.*

It can be safely assumed that this large number is continually growing because of the necessity to maintain large standing military forces in today's world.

It would appear that if Congress can subject retired regulars drawing pay to court martial, it could extend this military jurisdiction to retired reservists drawing pay. If this is so, persons who never dreamed of such subjections to court martial can be swept into the net of military jurisprudence retroactively by an exercise of Congressional power.

Aside from the large number of citizens directly affected by the Court of Claims decision, there is great importance in the result reached by the Court of Claims because of the effect that it may have on others. It should be obvious that a spouse of a regular member of the service who looks forward to the security of retirement after years of faithful service by her husband would be surprised to find that a misdeed by her husband in civil life after retirement forfeits all right to the security of pay and hospitalization they were enjoying and believed they had earned.

*[illegible] Exhibit B is a list of [illegible] and Exhibit C is a list of [illegible] which is designated by paragraph 4 of the record but not included in the [illegible] Exhibit B leads from the numbers of such persons to components of the Armed Forces.

The necessity of this country to maintain large Armed Forces demands a large number of career men in the services. One of the obvious inducements to making the service a career is the promise of liberal benefits on retirement, as can be observed on any recruiting poster. This inducement is hollow indeed if such benefits may be swept away by reason of conduct in civil life long after completion of an honorable military career.

The precise question of the constitutionality of court martialing retired persons drawing retirement pay has never been decided by this court and in fact is one of first impression in the Court of Claims. Appendix A, *infra*, p. 6.

The Court of Claims itself recognized the question involved here to be:

> "* * * by no means simple one and * * * fraught with elements vital not only to the Armed Forces but to retired personnel as well." Appendix A, *infra*, p. 6.

A final solution of the problem should be made by this court because the Court of Claims ruled only on the dismissal of petitioner and reserved opinion on whether a court martial could sentence a retired person to confinement. However, the Uniform Code of Military Justice is a penal code in the fullest sense and purports to grant the power to incarcerate persons subject thereto on conviction. If the comment that the opinion below was not passing on that power is an implication that the exercise of the power of confining a retired member of the service is illegal, then it invites only further litigation over the constitutionality of court martialing retired regulars.

The expression of some doubts as to the constitutionality of court martialing retired persons in the opinion below, Appendix A, *infra*, p. 9, will also bring further attack on the court martialing of retired personnel unless this court makes a final decision on the question.

Petitioner submits that it is most important that this court resolve a question which so vitally effects a large number of persons and the interests of the United States.

2. The Court of Claims has decided a federal question in a way which is in implied conflict with applicable decisions of this court:

The Court of Claims sustained the constitutionality of Article 2(d) of the Uniform Code of Military Justice largely on the basis of dictum in the case of *United States v. Tyler*, 105 U. S. 244 (1881), that retired officers of the Army were subject to court martial. This assumption of fact, over three-quarters of a century ago, was historically inaccurate.

In 1778 Congress approved a formal plan for the establishment of the Army and provided for seven years half pay for retired and disabled officers. *Worthington C. Ford, Journal of the Continental Congress*, Vol. 11, pp. 95-96 and 502.

The Articles of War passed in 1776 were based on the British military ordinances and Articles of War. Prior to 1893 all British military ordinances and Articles of War remained in force only during the service of troops for whose government they were issued and ceased to operate upon the conclusion of peace. See Military Law under the Uniform Code of Military Justice,

Ancock & Wurfel (1955), University of North Carolina Press, p. 8; Naval Law and History Traced from Earliest Times, Naval Justice, Bureau of Naval Personnel pp. 11, 22 (Oct. 1945). Thus at the time the Constitution was drafted there was no such category as retired personnel entitled to receive pay unless it be in the sense of the provision for seven years half pay. However, these persons were clearly not subject to court martial under the Articles of War which were based on the then existing British Articles of War.

It was not until 1861 that the military was reorganized with provision for subjecting retired officers to the Articles of War (12 Stat. 290). The legislative history of this enactment is set out in Congressional Globe, 37th Cong., 1st Sess. 1861, pp. 16-17, 157-167, 185.

The wide sweeping dictum of *United States v. Tyler*, 105 U. S. 244 (1881), and the decisions in *Runkle v. United States*, 19 Ct. Cl. 396 (1884), rev'd on other grounds, 122 U. S. 543 (1887), *Franklin v. United States*, 29 Ct. Cl. 46 (1893), *Mayan v. United States*, 78 Ct. Cl. 567 (1933), and *Lemley v. United States*, 109 Ct. Cl. 760 (1948), relied on by the Court of Claims, are distinguishable from the instant case.

These decisions which flowed from *United States v. Tyler*, *supra*, involved larger questions of pay to retired officers. They did not involve the constitutional question here presented. The determination that retired personnel are "in" the service for purposes of particular statutes governing computation of the amount of compensation are not persuasive that one is so vitally connected with the Armed Forces that he may be treated as "in" the service for purpose of court martialing him.

where he has been wholly retired for seven years, withdrawn from his command and never recalled to active duty, as in the case of petitioner.

The landmark decisions in *United States ex rel. Toth v. Quarles*, 350 U. S. 11 (1955); *Reid v. Covert* and *Kinsella v. Krueger*, 354 U. S. 1 (1957); *Kinsella v. United States ex rel. Singleton*, 361 U. S. 234 (1960); *McElroy v. United States ex rel. Guagliardo*, 361 U. S. 281 (1960); *Grisham v. Hagan*, 361 U. S. 278 (1960), indicate a pragmatic approach is required to determine if one is "in" the service, so as to be subjected to court martial.

The factors that have been considered controlling can be enumerated as follows:

(1) Relation of defendant to the service;

(2) Status when crime committed;

(3) If punishment possible if there is no military jurisdiction;

(4) Relation of offense to discipline; and

(5) Number affected if military jurisdiction is upheld.

Taking these factors in order as applied to petitioner shows that he was wholly retired in a civilian community, subject to criminal jurisdiction of civil courts, charged with commission of a crime unrelated to discipline, and one of a large number subjected to the military jurisdiction if it is upheld. Thus it is submitted that the Court of Claims in relying on "stale" dictum in *United States v. Tyler*, *supra*, and the alleged factor of pay to petitioner has made a decision conflicting with the latest pronouncements of this court. The position of the Court of Claims that the

decisions in *United States ex rel. Toth v. Quarles*, *supra*, and its companion cases, all involved civilians who were clearly not subject to court martial is to ignore the factors that determined these persons were civilians and not "in" the land or naval forces for purposes of courts martial.

The power of the Court of Claims to the conceptual approach to the problem of seventy-five years ago without regard to the rationale set forth in *Toth* and succeeding cases of recent years creates confusion and doubt again as to the yardstick to be used in determining what persons are subject to court martial.

Conclusion.

For the foregoing reasons and the Court of Claims own expression of the importance of the question, together with its announced doubt of the validity of its decision, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A.

Opinion of the United States Court of Claims.

In the United States Court of Claims No. 212-63 (Decided January 24, 1964).

Selden G. Hooper v. The United States.

Oscar F. Irwin for the plaintiff. William Hilyer on the briefs.

John R. Franklin, with whom was Assistant Attorney General John W. Douglas, for defendant.

Before Jones, Chief Judge, Whitaker, Laramore, Durfee, and Davis, Judges.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Laramore, Judge, delivered the opinion of the court:

Plaintiff, an officer of the Regular Navy, retired for years of service, not on active duty, was charged by naval authorities with violations of the Uniform Code of Military Justice. The charges were based on alleged homosexual acts occurring at a private residence, not a part of any military or naval reservation. Plaintiff, without being recalled to active duty, and over his objection, was subjected to trial by naval court-martial and sentenced to dismissal and forfeiture of all pay and allowances.

On September 25, 1958, the U.S. Court of Military Appeals affirmed the decision of the Board of Review, which Board had affirmed plaintiff's conviction. On January 7, 1961, plaintiff's conviction and sentence were approved and ordered executed by the President of the United States, and payment of plaintiff's retired pay was discontinued as of that date.

Plaintiff brings this suit for retired pay withheld, alleging the unconstitutionality of Article 2(4) of the Uniform Code of Military Justice, 64 Stat. 107, 108; 10 U.S.C. §802 (1958).

Article 2(4) of the Uniform Code of Military Justice, *supra*, provides in pertinent part:

> The following persons are subject to this chapter:
>
> * * * * *
>
> (4) Retired members of a regular component of the armed forces who are entitled to pay.

Plaintiff's case is premised solely on the contention that court-martial jurisdiction is strictly limited to those persons who bear such a proximate relationship to the Armed Forces and their functions as to be reasonably treated as "in" the Armed Forces. Plaintiff argues that the exercise of court-martial jurisdiction over him is unconstitutional since a retired naval officer, for this purpose, does not have such a relationship with the military so that it can be said that he is "in" the Armed Forces. Defendant, on the other hand, contends that the court-martial exercise of jurisdiction over this plaintiff, under Article 2(4) of the Uniform Code of Military Justice, *supra*, is constitutionally valid. As an affirmative defense the defendant alleges that plaintiff's claim is barred by the doctrines of res judicata and collateral estoppel, in view of the fact that plaintiff, throughout the military proceedings, contended that the exercise of jurisdiction over him by that tribunal was unconstitutional. This issue was finally adversely decided against plaintiff by the U.S. Court of Military Appeals in the case of *United States v. Hooper*, 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958). Consequently, the defendant claims that the doctrine of res judicata should be applied

as a bar to the instant case since the basis for his cause of action in this court is the unconstitutional exercise of jurisdiction over him, which issue has already been adversely decided by the U.S. Court of Military Appeals. The defendant in the alternative contends that if the doctrine of res judicata is not applied, then the plaintiff is collaterally estopped from raising the constitutionality of the exercise of jurisdiction over him, since this issue has already been decided adversely by the military tribunal. The defendant further contends that the present suit is barred by the decision of *Hooper v. Hartman*, 163 F. Supp. 437 (S.D. Cal. 1958), aff'd 274 F. 2d 429 (9th Cir. 1959). This suit was initiated by plaintiff, while the court-martial proceeding was pending, for prohibitory and injunctive relief against the Commandant of the Naval District challenging the exercise of court-martial jurisdiction over him.

We disagree with defendant's contentions regarding res judicata and collateral estoppel.

First, we turn to plaintiff's suit in the District Court which was affirmed by the Court of Appeals. In that case, the Court of Appeals merely held that as the process of review of plaintiff's conviction provided by the Uniform Code of Military Justice had not yet been completed, the civil courts were without jurisdiction so long as the military remedies remained unexhausted. Consequently, it cannot be said that that decision is a bar to the present suit since the constitutional issue was never decided by the Court of Appeals, although the lower court had passed on the issue. The reviewing court merely stated that it lacked jurisdiction to hear the case, since it was implicit in the trial court's decision that plaintiff had failed to exhaust his military remedy.

We turn now to the decision of the U.S. Court of Military Appeals. We are taught by the Supreme Court that before the doctrine of res judicata is applicable as a bar to a second suit, not only must the parties be the same but also the second suit must be upon the same cause of action or demand as the original. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). Clearly this case is not between the same parties, and it is based entirely on a different cause of action or demand. Thus, the doctrine of res judicata cannot be applied to the case at bar.

Collateral estoppel, on the other hand, applies where the second cause of action is between the same parties but upon a different cause or demand. As the Supreme Court has stated:

> In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Commissioner v. Sunnen*, *supra*, at 598.

We are also mindful of the fact that the application of res judicata and collateral estoppel is not required by constitutional law doctrines, but each is a judicially developed restriction invoked in the name of public policy requiring that a litigant be given only one day in court (*Commissioner v. Sunnen*, *supra*, at 597; *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931)). It appears that where the public policy requiring the application of res judicata and collateral estoppel is outweighed by overriding considerations like Federal pre-emption (*Kalb v. Feuerstein*, 308 U.S. 433

(1940)), or sovereign immunity (*United States v. United States Fidelity Co.*, 309 U.S. 506 (1940)), the Court has not adhered to the finality that would otherwise be given to the prior decree. We believe that an example of such an overriding consideration is present here, since a party should be given his day in a court from which review by the Supreme Court might ultimately be afforded.[1] This was not present in the instant case because of the finality given to the decisions of the Court of Military Appeals. Article 76 of the Uniform Code of Military Justice, 64 Stat. 107, 132, 10 U.S.C. § 876 (1958). The possibility of review by the Supreme Court was not present or available. In situations where the conviction by the military tribunal results in the incarceration of the defendant, review of the constitutional exercise of jurisdiction is by way of habeas corpus proceedings to the U.S. District Court. *E.g., McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960). However, in the instant situation plaintiff's conviction did not result in his confinement, so that this avenue of review was not open to him. The plaintiff's only remedy was to bring a suit in this court for retired pay withheld alleging the unconstitutional exercise of jurisdiction over him.

Turning next to the constitutional question involved, *i.e.*, whether or not plaintiff, as a retired member of a regular component of the Armed Forces entitled to receive pay, is a part of the land or naval forces "subject to court-martial jurisdiction",

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[1] The Restatement of Conflict of Laws recognizes the possibility of such exceptions where "the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction." Restatement, Conflict of Laws, §451(2) (Supp. 1948). See also *Hunter v. Duke*, — U.S. —, No. 37 (1963), slip op. at 8.

Plaintiff strenuously argues that court-martial jurisdiction is strictly limited to those persons who bear such a proximate relationship to the Armed Forces and their functions as to be reasonably treated as "in" the Armed Forces. In this respect, plaintiff argues that his relationship to the Navy and its functions, rendering him amenable to trial and sentence, was completely lacking in that he had been wholly retired for seven years, withdrawn from his command, and never recalled to active duty.

Defendant, on the other hand, just as vigorously contends that Article 2(4) of the Uniform Code of Military Justice, *supra*, under which plaintiff was tried and sentenced, was constitutionally valid.

The question is by no means a simple one and is fraught with elements vital not only to the Armed Forces but to retired personnel as well. We are aware that whether or not Congress may provide for trial by court-martial of retired Regulars is essentially a question of power. We must turn for such authorization to Article I, section 8, of the Constitution which provides that Congress shall have the power "[t]o make Rules for the Government and Regulation of the land and naval Forces." It follows that the power of Congress to provide for trial by court-martial is limited to those individuals who can be said to fall within the definition of "land and naval forces." Therefore, the question before us is whether this plaintiff, a retired officer of a regular component of the Armed Forces, is part of the "land and naval forces" and thus subject to court-martial jurisdiction for illegal acts committed after retirement. Taken in this context, this question is of first

impression.[2] However, courts in the past have had occasion to express an opinion relative to a retiree's connection with the land or naval forces. For instance, the Supreme Court in the case of *United States v. Tyler*, 105 U.S. 244, 245-246 (1881), had this to say:

> The provisions of the statutes, and the uniform treatment of these officers [retired], conform to this view, and necessarily imply that, while not required to perform full service, *they are a part of the army*, and may be assigned to such duty as the laws and regulations permit.
>
> * * * * * *
>
> It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still *not* in the military service." [Emphasis added.]

As early as 1880, this court, in the case of *Tyler v. United States*, 16 Ct. Cl. 223, affirmed by the Supreme Court, *United States v. Tyler*, *supra*, held that officers on the retired list still remained in the service.[3] Other cases in which this court has expressed a similar opinion on the subject are *Kimball v. United States*, 19 Ct. Cl.

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[2] Compare *Chambers of Ill. v. United States*, 102 F. Supp. 425, 426, 120 Ct. Cl. 106 (1951), involving acts committed by a retiree prior to retirement.

396 (1884), reversed on other grounds, 122 U.S. 543 (1887); *Franklin v. United States*, 29 Ct. Cl. 6 (1893); *Marvin v. United States*, 78 Ct. Cl. 567 (1933); *Lemley v. United States*, 109 Ct. Cl. 760 (1948). Concededly, the above cases do not involve a construction of the statute here in question, but significantly each time the question of connection between a retired officer and the Armed Forces was involved, the courts have responded by expressing an opinion that retired personnel are a part of the land or naval forces and, when called upon, courts have assumed that being part of such forces, court-martial jurisdiction necessarily attaches to them. *E.g.*, *United States v. Tyler*, *supra*, at 246.

Plaintiff places reliance on the Supreme Court decisions in the cases of *Reed v. Covert*, 354 U.S. 1 (1957); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *McElroy v. United States ex rel. Guagliardo*, *supra*; *Grisham v. Hagan*, 361 U.S. 278 (1960).

In each case above cited, the Supreme Court held the pertinent article of the Uniform Code of Military Justice (Article 2(11)) could not constitutionally be applied to those defendants in the court-martial proceedings, since they were not part of the land and naval forces of the United States.

Article 2(11) of section 802 of the Uniform Code of Military Justice, *supra*, provided:

> The following persons are subject to this chapter:
>
> * * * * *
>
> (11) Subject to any treaty or agreement to which the United States is or may be a party or to

> any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.

We believe all the above cases to be inapposite to the case at bar. In each of the cited cases, the accused were either civilian employees of the Armed forces or dependents of military personnel and clearly not a part of the land or naval forces of the United States. The Supreme Court held that the power of Congress under Article 1, section 8, of the Constitution, "[t]o make rules for the Government and Regulation of the land and naval Forces," taken in conjunction with the necessary and proper clause, does not extend to civilians. These civilians who were subjected to court-martial jurisdiction did not have any direct connection with the operation of the "land or naval forces"; they were never part of the combat troops of the United States, and there was never a necessity to subject them to military discipline.

We believe the function of this court is to uphold an act of Congress unless the same is clearly unconstitutional. In the case at bar, while we have certain doubts, we cannot say that the act is clearly unconstitutional. Consequently, we hold that the exercise of jurisdiction by the military tribunal over this plaintiff was constitutionally valid, since we believe that this plaintiff was part of the land or naval forces. We say this because the salary he received was not solely recompense for past services, but a means devised by Congress to assure his availability and preparedness in future contingencies.

He had a direct connection with the operation of the "land and naval forces." Thus, he formed a part of a vital segment of our national defense and it naturally follows that he should be subject to military discipline. This is in conformity with the decision of the U.S. Court of Military Appeals in the case of *United States v. Hooper, supra*. Moreover, we are persuaded by the language of the Supreme Court in *United States v. Tyler, supra*, wherein it is clear that the Court assumed the exercise of court-martial jurisdiction would be proper. We add that we are concerned in this case only with the power of Congress to provide that a retired officer can be dismissed from the service by a court-martial for offenses against the Uniform Code of Military Justice. We are not concerned with the authority of a court-martial to order the confinement of a retired officer and our holding does not reach that issue.

It naturally follows that since retired personnel are a part of the land or naval forces, they are subject to laws and regulations applicable thereto. Under these circumstances, Article 2(4) of the Uniform Code of Military Justice, authorizing the application of such Code to members on the retired list of the Armed Forces and thereby authorizing their trial by courts-martial, is a valid exercise by Congress of its powers; further, that the application of such jurisdiction to this plaintiff was constitutional and his dismissal from the Navy was a valid exercise of the powers reposed in the President as Commander-in-Chief. Since plaintiff was validly dismissed from the Navy, his entitlement to retired pay no longer exists.

Plaintiff's motion for summary judgment is denied, defendant's cross-motion is granted, and plaintiff's petition is dismissed.